
GENERAL NOTICE

NOTICE 1315 OF 2006

DEPARTMENT OF TRANSPORT

STRATEGY FOR THE RESTRUCTURING OF THE ROAD ACCIDENT FUND AS COMPULSORY SOCIAL INSURANCE IN RELATION TO THE COMPREHENSIVE SOCIAL SECURITY SYSTEM

The above-mentioned Strategy for the restructuring is hereby published for public comments. Interested persons are invited to submit written comments on the Strategy for the restructuring by no later than 07 October 2006. Submissions should be posted to the Director-General for the attention of Adv. AM Masombuka and Mr. Marius Luyt at:

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transport

Department:
Transport
REPUBLIC OF SOUTH AFRICA

**STRATEGY FOR THE RESTRUCTURING
OF THE ROAD ACCIDENT FUND
AS COMPULSORY SOCIAL INSURANCE
IN RELATION TO THE
COMPREHENSIVE SOCIAL SECURITY SYSTEM**

SEPTEMBER 2006

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EXECUTIVE SUMMARY

The purpose of State support to victims of road accidents is to prevent their impoverishment and respond to the extent to which a person's ability to secure a livelihood is threatened. A no-fault benefit scheme provides access to benefits to all road users, allows protection to those unable to afford protection against the risk of a road accident and ensures reintegration into social and economic activities. It is therefore proposed that a no-fault benefit scheme replaces the current Road Accident Fund liability compensation system to provide a more equitable, reasonable, affordable and sustainable system of protection for road accident victims.

The Road Accident Benefit Scheme will provide benefits to all injured road users. Factors such as employment status and the ability to prove losses suffered will not be relevant to eligibility. The change to a no-fault system allows for a focus on the poor who are most vulnerable to external shocks and ensures access to benefits for all road users. Furthermore, the benefit scheme provides for greater equity in the provision of public support to all victims of misfortune.

All those in need of healthcare treatment will be eligible for healthcare benefits. This will allow for a more reasonable system in which the reintegration of victims into social and economic life is paramount. Removing the uncertainty created by fault, the benefit scheme can promote appropriate emergency and rehabilitative care to increase the chances of recovery and limit the extent of disability.

By providing benefits to all road users the scheme will limit the levels of benefits available. The key principle is that the Benefit Scheme will protect the lives and livelihoods of road accident victims. Risks relating to lifestyle protection will form part of discretionary protection in the form of personal insurance.

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Integration into the Comprehensive Social Security System is critical to sustainability. In ensuring that critical service delivery platforms in emergency healthcare, rehabilitation and disability support are strengthened, the efficiency of the system will be enhanced, whilst a focus on road safety, injury prevention and treatment and incident management will improve the effectiveness of the system.

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1: OVERVIEW

1.1 Introduction

The RAF is the product of a long history spanning more than sixty years. The Motor Vehicle Assurance Act, 1942 (Act No 29 of 1942), was the first statute in South Africa which provided for compulsory insurance to ensure that victims of motor vehicle accidents could, subject to certain limitations and exclusions, recover damages, which were caused unlawfully by motor vehicles.

During the debates of the House of Assembly in April 1942, Dr. Bremer made the following plea: "I want the country and the public to know that if the whole of the house supports the Bill it does so because it aims at the protection of those who cannot look after themselves. But when by means of legislation we impose additional burdens, which affect the poorer sections of the population much more severely...it should be clearly understood that it is for the protection of those self-same people." The dual intention of the legislation with regards to establishing compulsory insurance whilst seeking to provide security to those unable to look after themselves rings clear in this statement. This is the duality that has haunted our system of compensation for over 50 year.

In the sixties it became apparent that certain insurance companies had insufficient income to cover claims. Several companies were liquidated and this showed the way for the establishment in 1972 of the Compulsory Motor Vehicle Insurance Act as re-insurer of companies, which took compulsory MVA insurance.

The provisions of the Motor Vehicle Accident Act 54 of 1986 changed the funding of the compulsory motor vehicle insurance system from one of procuring funding through the sale of tokens to one in which the funding of

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the system is obtained from a levy on fuel sold within the Republic of South Africa. The 1986 Act also introduced the agency system in terms of which certain insurance companies were appointed to act as agents for the MVA Fund to handle and settle claims. This agency system and funding method through fuel levies were retained in the Multilateral Motor Vehicle Accident Fund Act, 1989 (Act No 93 of 1989). The agency system was undesirable and ineffective and was phased out from 1993 to 1997, although still provided for in the 1996 Act.

The Road Accident Fund Act, 1996, aimed to provide for the transitional matters to ensure a rationalised and uniform legal framework, to this end the Act retained most of the provision of the Multilateral Motor Vehicle Accident Fund Act to ensure minimum disruption in the administration of claims. The provisions relating to the functions, finances and operation of the previous Fund as well as the terms and conditions upon which compensation is paid, were retained.

Apart from the continuous legislative changes, various commissions of inquiry have been appointed by Government to address concerns regarding the system of compensation. These are reflected below as they relate to relevant legislation:

Motor Vehicle Assurance Act 29 Of 1942

- Corder Commission of Inquiry (1954)
- Du Plessis Commission of Inquiry (1962)

Compulsory Motor Vehicle Insurance Act No 56 of 1972

- Wessels Commission of Inquiry (1976)
- Grosskopf Commission of Inquiry (1981)

Motor Vehicle Accident Act No 84 of 1986

- Viviers Commission of Inquiry (1987)

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- **Multilateral Motor Vehicle Accidents Fund Act 93 of 1989**

- **Melamet Commission of Inquiry (1992)**

Road Accident Fund Act No 56 of 1996

- **Satchwell Commission of Inquiry (2002)**

Despite the immense effort put into addressing concerns, the recommendations of these commissions have rarely been implemented. Hence, concerns remain as valid today as they were 50 years ago, save for the magnitude of the problems, which have increased exponentially.

In this strategy document the arguments for the shift to a no-fault system are highlighted. In the next section the international context of state support to road accident victims are outlined and advantages of the adoption of a no-fault system are highlighted. In section two, road safety in South Africa is highlighted as the specific context to which the policy change speaks, whilst the problem statement, which the policy change seeks to address, is outlined in section three. In the next section the principles of a Comprehensive Social Security System are outlined to highlight the systemic benefits of incorporating the current system into the social security system. In section five the policy guidelines for the creation of the Road Accident Benefit Scheme and the proposed benefits are provided, whilst recommendations for the implementation of the new scheme is the focus of section six. An overview of the constitutional implications of the shift to a no-fault system of benefits is provided in section 7, and the implications for various social groups are highlighted in section 8. The document concludes with the consultations which guided the policy change.

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1.2 The need for a system of protection for road users

Continuing increases in the rate of accidents on our roads threatens the safety of our citizens and the lives of all South Africans. The impact of civil claims arising out of road accidents threatens the lives and livelihoods of all our citizens. For a moment of inattentiveness, any driver can face financial ruin, whilst those injured through the reckless actions of another may not be able to recover their losses from the negligent driver. For these reason, the system of compensation, as we currently know it, was introduced in the 1940's, serving to protect both the victims and the wrongdoer by standing in for the wrongdoer and compensating the victim. The system was therefore put in place to protect citizens of the consequences of road accidents, the victim receiving compensation and the wrongdoer relieved of his or her common law liability.

The rationale for the continued support to road accident victims is threefold. Firstly, the extent of the problem justifies a targeted approach towards victims whose lives and livelihoods are threatened due to the impact of a vehicle accident. In 2005 the total amount of fatalities on our roads were 14 124, representing the third largest category of unnatural deaths in the country. Secondly, the total cost of accidents has been estimated at R38 billion per annum, again a justification for the state to play a role in protecting citizens from the risk posed by road accidents. Thirdly, the negative impact of the common law as a remedy for consequences of road accidents, both for victims and wrongdoers, forces the state to find alternative mechanisms to address the consequences of road accidents.

1.3 Benefit and compensation systems

Internationally, various systems have been adopted. Broadly speaking, there are two types of systems. Fault-based systems, which provide

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liability insurance for those injured due to the wrongful driving of another and take full liability for all economic and other losses. No-fault systems on the other hand, provide limited benefits to all injured victims without taking into consideration the causes of the injury.

International experience indicates that the advantages of a no-fault scheme includes:

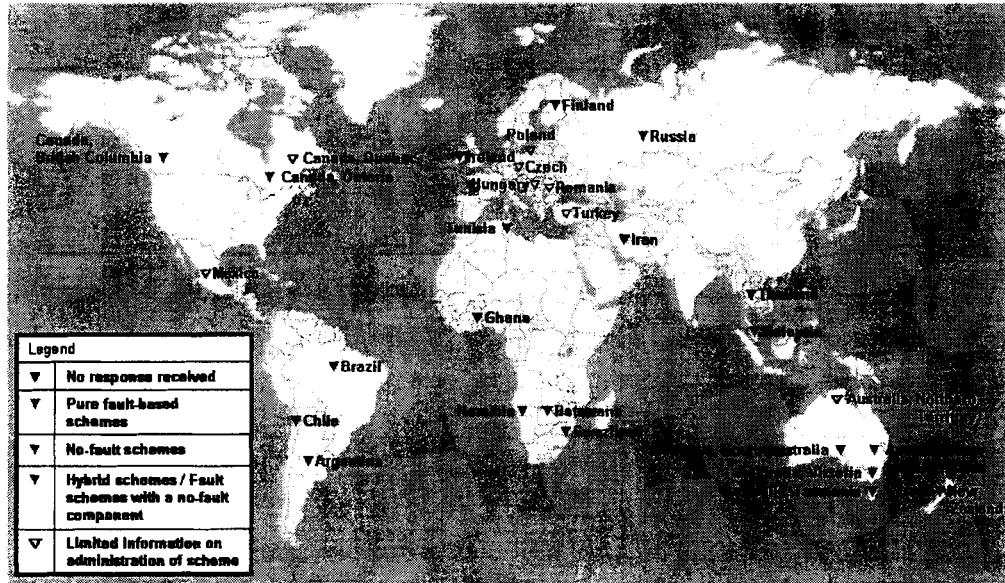
- Payment timeliness – If it is no longer necessary to determine fault, scheduled benefits can be made available as soon as validity of the accident can be determined.
- Reduced transaction costs – If the legal process is no longer funded by a scheme, administrative costs are significantly reduced. New Zealand's administrative costs amounts to 14.7% of total expenditure and includes the cost of their extensive injury prevention programme. Currently the settlement cost of the Road Accident Fund is 51% of total expenditure.
- Early treatment with better outcomes – without the risks to medical services providers associated with a fault-based system and with improved payment timeliness of a no-fault system, the access to early treatment is increased. In New Zealand this can be directly linked to the success of rehabilitation outcomes measured by the percentages of claimants who return to independence.

Most countries have adopted a combination of these two systems where benefits are provided on a no-fault basis for slight and moderate injuries and seriously injured victims can recover common law losses. In table 1, an overview of those countries reviewed and the systems of compensation or benefit adopted, are presented graphically. The varied nature of systems of compensation adopted worldwide is an indication that road

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accident compensation relates to country- and even state-specific socio-economic context, as well as the political and legal context of a system change. There is therefore no blueprint for the most appropriate system for South Africa.

Figure 1: Overview of systems adopted



Despite all intentions of the liability insurance system introduced in South Africa, the legislative and implementation of compulsory liability insurance has been fraught with difficulty. The initial private third party insurance was replaced with a fuel levy system to address rises in the cost of insurance. Management and administration of the system has never been satisfactory, whilst repeated calls to investigate an alternative system of compensation reflected a concern raised as early as 1955, that the current liability insurance system itself, is the problem.

It is critical to note that as early as 1975 there have been calls for further investigation into a no-fault system of compensation. The Road Accident Fund Commission, appointed in 1998, was the first Commission to investigate a no-fault approach and these recommendations will be dealt with extensively in this report. To understand the repeated calls to

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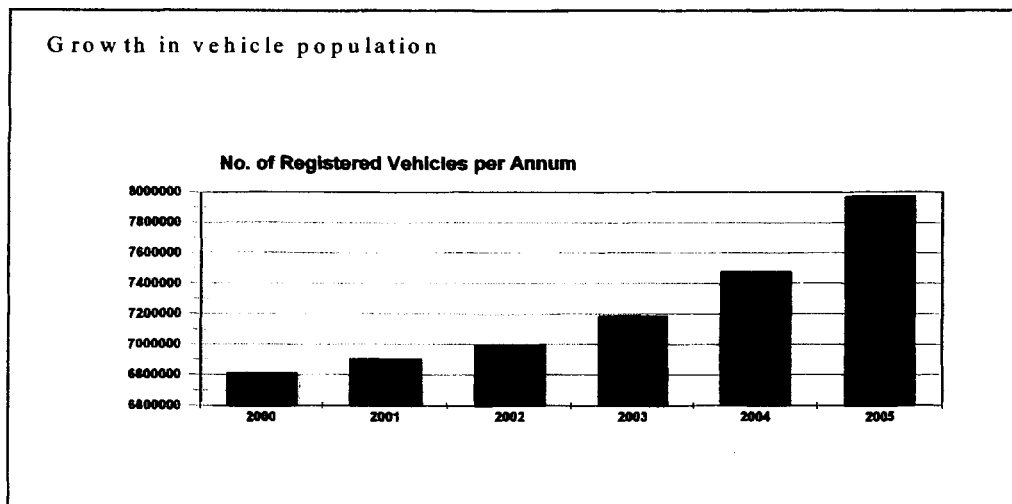
investigate an alternative system of road accident protection it is critical to understand the specifics of the South African road accident situation and the problems relating to the current fault-based liability insurance system. This will be the focus of the following two sections.

2. ROAD SAFETY IN SOUTH AFRICA

2.1 Growth in vehicle population

South Africa has a total vehicle population of 7,186,537 vehicles, 4,154,593 of which are motorcars, 241,000 mini-buses, and 27,221 buses, the balance, heavy vehicles, motorbikes and trailers. The number of registered vehicles increase by about 6% annually. Not only are the vehicles on our roads increasing but the average age of vehicles is 10 years, minibuses 13 years and buses and trucks from 11-12 years. Both factors negatively affect the rate of growth in road accidents. The growth in the vehicle population is reflected in graph 1 below.

Graph 1: Growth in Vehicle Population

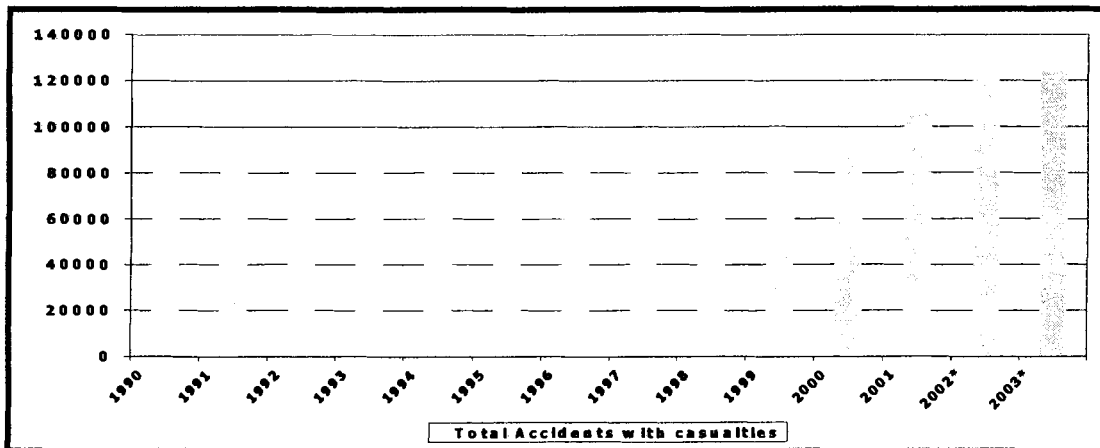


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2.2 Growth in road accidents

The number of fatal crashes per 100 million vehicle kilometers traveled increased from 6.2 in 1998 to 8.79 in 2002 and 8.63 in 2004. Graph 2 shows the growth in road accidents in which injuries were sustained.

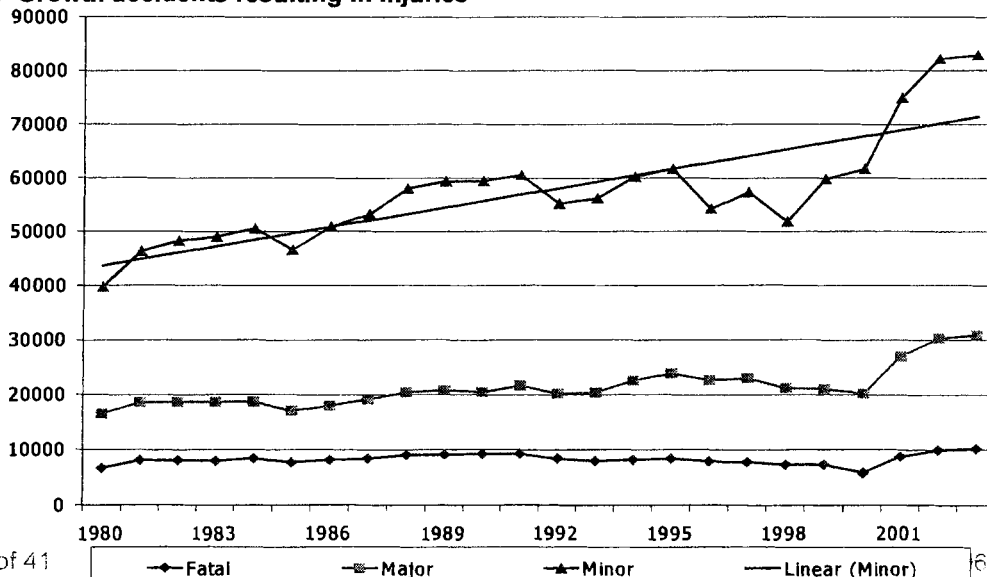
Graph 2: Growth in Road Accidents in South Africa



2.3 Road accident injuries

In 2005 14 124 people died on South Africa’s roads, nearly half of these being pedestrians. Around 7000 people annually are permanently disabled on our roads, and 40,000 seriously injured. Graph 3 provides the increases in injury classes and highlights the relatively high increases in slight injuries.

Graph 3: Growth accidents resulting in injuries



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3. PROBLEM STATEMENT

3.1 Unsustainable system of compensation

The growing accident rate in South Africa is the key factor that adds to the unsustainability of the current system. However, the system of compensation is leading to claims against the Fund increasing at a greater rate than increases in road accident casualties.

The claims liability of the Road Accident Fund has exceeded its income for more than 20 years. This has led to an accumulated deficit of R25.3¹ billion in 2005 and is expected to increase to R50 billion in the next ten years. Economic growth itself increases the exposure of the Fund and increases claims against the Fund.

The financial position of the Fund is currently threatening the ability of the public entity to meet its legislative mandate and threatens corporate governance compliance. The weaknesses in the management and administration of the Fund, frequently blamed for the worsening position of the Fund are the result and not the cause of the weakening solvency position of the Fund. Management has no control over income, which is mostly dependant on economic activity, or expenditure, which is dependant on legal rights and processes. The situation that those responsible for the management of the Fund are able to influence only 20% of expenditure, adds to the unsustainability of the system of compensation.

¹ Road Accident Fund Financial Model, Deloitte (2006).

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3.2 Inequitable system of compensation

The liability insurance system, according to which victims of motor vehicle accidents on South African roads are compensated, has since its inception led to inequalities in the provision of support to those unable to look after themselves due to injuries sustained. The outcomes of the fault-based system perpetuate disparities between the rich and the poor, the rural and urban victims, the employed and the unemployed.

Since the 1950's critics² of the application of the Law of Delict in relation to road accident compensation have highlighted the flaws of the system, still in use today. In short, these criticisms relate to the difficulty in proving fault in a motor vehicle accident; the inability to claim for those accidents where one party is involved; the high settlement cost of a fault-based system and the delay in the provision of compensation due to the complexities of the legal processes.

The current system is based on exclusion rather than inclusion. It is deemed to be unfair for the right to claim to be dependant on capricious circumstances and evidence required by law. Ignorance, poverty, limited access to legal assistance, absence of evidence and constraints due to the injuries sustained, all render it difficult to successfully circumvent the hurdles of fault.

² Suzman, A (1955) "Motor Vehicle Accidents: Proposals for a System of Collective Responsibility irrespective of Fault", South African Law Journal, pp.374 – 584; Street, H (1968) "Compensation for Road Accident Victims", South African Law Journal, pp. 49 – 64; Van der Walt (1969), "Die Grondslag van Deliktuele Aanspreeklikheid" Tydskrif vir Hedendaagse Romeins-Hollandse Reg, pp.319 – 337; Botha, D H (1975) "No-fault Motor Vehicle Accident Insurance", Tydskrif vir Hedendaagse Romeins-Hollandse Reg, pp.162 – 170; Burchell JM (1982), "Developments in Other Countries: No-Fault Compensation for Motor-Accident Victims" Businessman's Law, pp. 107 – 110; Klar, LN (1983) "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective", University of Toronto Law Journal, pp. 80 – 107; Pulvermacher, J (1984), "Limits of Compensation Insurance", Responsa Meridiana, pp. 341 – 355; Sugerman, SD (1985), "Doing away with Tort Law", California Law Review, pp. 558 – 561.

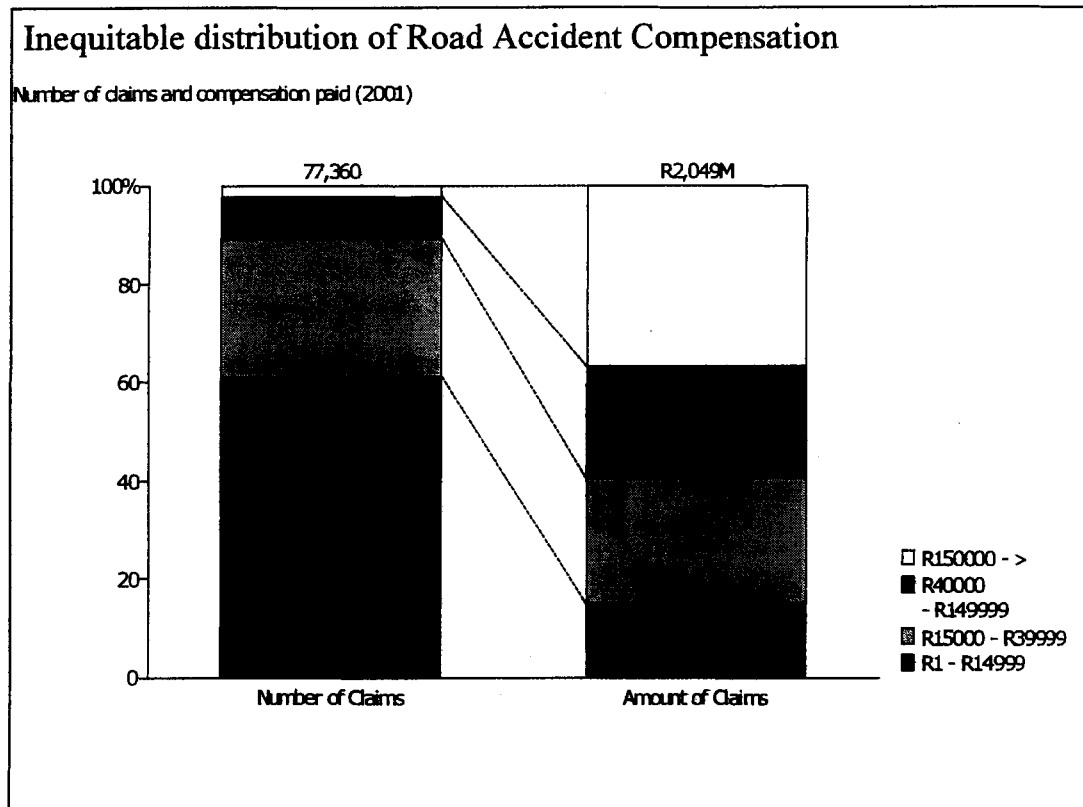
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There is no rational correlation between the fuel levy, the risks created by individual motorists and the type and extent of cover. The current system is fraught with discrimination, as those in the second economy find it difficult, if not impossible, to prove losses suffered. This results in the poor subsidising wealthy road users whose contributions are not related to their claims for projected losses and who are able to claim unlimited compensation based on lifestyle losses.

The distribution of compensation is reflected in graph 4 below where 60% of claimants receive less than 20% of compensation, whilst less than 5% of claimants claim 40% of the compensation paid. These inequities are further exaggerated when only focusing on loss of income distribution. The outcomes current system reflects the inequalities in SA where the 60% of those claiming for low level of income are paid only 6% of total loss of income compensation – whereas the 15% claiming for income higher incomes are paid 75% of loss of income compensation.

Graph 4: Inequitable Distribution of Road Accident Compensation

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The current system perpetuates inequality amongst victims. Whilst the rich and poor contribute 36.5c for every litre of petrol, wealthy drivers are disproportionately compensated, both in terms of income losses and healthcare, and are therefore subsidised by those more vulnerable to the shock of an accident. Due to local and congestion factors on rural roads the proportion of one-vehicle accidents caused, for example, by animals are higher. Again, those in need find themselves with nowhere to turn to.

"...the present system of unlimited compensation perpetuate gross inequality between road users whose compensation is not proportionate to their contributions towards the fuel levy or their needs but is related solely to their pre-accident economic and social status"³.

³ Road Accident Fund Commission (2002), p. 449

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3.3 Unreasonable system of compensation

The allocation of compensation is not conducive to rehabilitation outcomes for those seriously injured. Compensation is skewed towards those able to prove damages; those injured slightly and towards non-economic losses. Delays between three and eight years in receiving compensation threatens the lives and livelihoods of the indigent who often turn to the social grant system for help, despite their contribution to the Fund.

The apportionment of liability results in compensation being reduced to the extent that the claimant was at fault in the accident, in such a case the Fund will only pay for a percentage of the future medical treatment required. However, the effect of this is that those unable to afford the apportioned part of the cost of medical treatment are unable to access the compensation to which they are entitled and hence unable to access necessary treatment. This is true whether their negligence was significant or not. Therefore, whilst wrongdoers, able to afford to contribute to their treatment are able to claim a portion of compensation from the Fund, those unable to contribute to the treatment receive no compensation at all. The basis of the current system and its supporting legislation is therefore in conflict with the constitutional requirements to provide protection without introducing unfair discrimination.

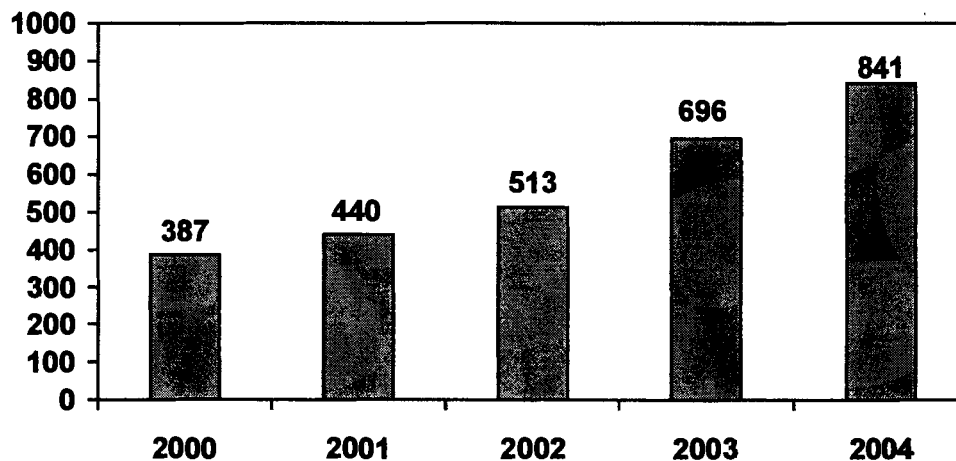
“Skills, time, money and energy are expended on attributing or denying blame instead of being dedicated to road safety, emergency medical services trauma care and early and effective medical and rehabilitative intervention”⁴.

⁴ Road Accident Fund Commission (2002), p. XVII

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The recent⁵ increase in the fuel levy to 36.5c per liter will not benefit the victims of road accidents, as only 45% of this increase will reach the pockets of those injured in road accidents. A major part of the increase will be used to fund legal expenses of the Fund and the claimant. These costs have led to compensation only covering costs, or situations where victims are left with only legal bills after they have received compensation. The growth in legal costs of both the Fund and the claimants is reflected in graph 5 below.

Graph 5: Growth in Total Legal Costs since 2000 (R million)



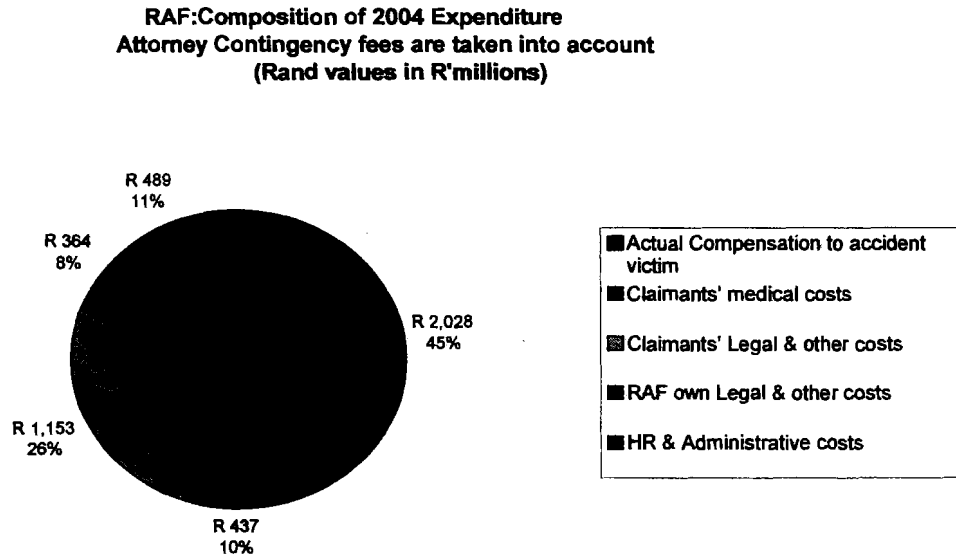
The unreasonable distribution of the fuel levy in relation to non-economic losses and growth in compensation for loss of income has negatively impacted on the provision of medical compensation for road accident victims. The Fund is currently spending nearly half of all compensation paid to victims on compensation for pain and suffering whilst less than 10% of compensation is being spent on healthcare. Furthermore, those providing healthcare services carry the cost of providing such treatment and the risk of not knowing whether the full cost will be covered and then face a situation where payment is frequently overdue for years. It is within such a context, caused by the fault-based system, that victims are left next to the road or appropriate treatment is not provided.

⁵ Budget Speech, Minister of Finance, 15th February 2006.

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In figure 6 the trends in compensation highlights the unreasonable outcomes of the current system in which 60% of those who receive compensation are never admitted to hospital.

Figure 6: Actual Compensation to Road Accident Victims



3.4 Unaffordable system of compensation

"The harsh truth is that road accident compensation in South Africa cannot any longer be premised upon the expensive fiction that it is either equitable or affordable for the State to make good all damages sustained by road accident victims"⁶.

The continued affordability of a system which all South Africans contribute to, in one way or another, whilst real benefits are only available to a few is questioned in light of other pressing social priorities.

⁶ Road Accident Fund Commission (2002), p. 434

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The combination of unlimited claims and the growth in settlement cost is limiting the Funds ability to meet its mandate in providing compensation to victims of road accidents. Table 1 shows the current liquidity position of the Fund, which has led to the financial statements of the Fund being qualified since 2003.

Table 1: Balance Sheet Analysis

RAF: Balance Sheet Analysis						
	2005	2004	2003	2002	2001	2000
	R'000	R'000	R'000	R'000	R'000	R'000
TOTAL ASSETS	1,707,643	768,002	1,249,956	1,631,868	1,934,182	2,213,774
TOTAL LIABILITIES	(21,557,476)	(19,324,865)	(16,679,573)	(12,756,868)	(15,269,144)	(12,694,883)
Nett Total liabilities/ Negative equity	(19,849,833)	(18,556,863)	(15,429,617)	(11,125,000)	(13,334,962)	(10,481,109)
Current assets	1,644,954	688,466	654,950	652,153	591,145	545,828
Current liabilities	5,517,366	4,517,665	3,716,373	3,686,561	3,111,254	2,587,706
Nett Current liabilities	(3,872,412)	(3,829,199)	(3,061,423)	(3,034,408)	(2,520,109)	(2,041,878)

4. **COMPREHENSIVE SOCIAL SECURITY SYSTEM**

The ultimate purpose of social protection is to increase capabilities and opportunities, promoting economic dynamism and creativity and thereby social justice and social cohesion. The shift from the current liability insurance system a social security scheme allows for a focus shift from the causes of road accidents to the consequences of accidents on the lives of all South Africans.

Three pillars represent the components of the Comprehensive Social Security System (CSSS). The first pillar provides basic universal protection; this includes grants and free healthcare. The second pillar

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provides for compulsory contributory cover for individuals in a position to contribute to the protection of specific risks such as road accidents. The third pillar provides discretionary protection based on preferences and willingness to pay. The Road Accident Benefit Scheme will form part of the CSSS as a form of contributory social insurance (Pillar 2) with a scheduled framework of benefits.

The incorporation of the Fund into the CSSS aligns the benefits available to other victims of misfortune, releases the pressure on basic social security (Pillar 1) and ensures that protection of lifestyles is provided for those preferring full personal protection (Pillar 3). The current pressure on basic endowment, due to the fault-based system excluding victims from claiming, will be addressed, as all victims are able to claim. The restructuring of the current system will lead to limited benefits available to all road users. Those who are able to protect their lifestyles will be able to cover their increased risks through personal insurance, representing discretionary protection, based on preference and willingness to pay.

The goal of the incorporation of the Fund into the CSSS is to facilitate coordination, maximise resources use, create synergies and utilise complementarities, design and implement for efficiency of outcomes. The incorporation of road accident benefits into this system allows for systemic improvements to facilitate the reintegration of victims into economic and social activities, improvements not possible in the individualized compensation system currently in place.

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5. CREATION OF THE ROAD ACCIDENT BENEFIT SCHEME

5.1 Benefits of shifting to a no-fault system

5.1.1 Equitable

The Road Accident Benefit Scheme (RABS) will provide benefits to all injured road users. Benefits are both income and injury related but does not exclude those unable to prove an income. The change to a no-fault system allows for a focus on the poor who are most vulnerable to external shocks and provides for greater equity in the provision of public support to all victims of misfortune.

5.1.2 Reasonable

All those in need of healthcare treatment will be eligible for healthcare benefits irrespective of their negligence in the accident. The reintegration of victims into social and economic life becomes paramount. Removing the uncertainty created by fault, the benefit scheme can promote appropriate emergency and rehabilitative care to increase the chances of recovery and limit the extent of disability

“The purpose of road accident benefits should be to promote optimum healthcare intervention where there are significant injuries, encourage meaningful rehabilitation to prevent permanent disability, reduce exposure to impoverishment and enable accessible life care to avert further destruction of the lives of the permanently disabled...”⁷

5.1.3 Affordable

By providing benefits to all road users the scheme will limit the levels of benefits available. The key principle is that the Benefit Scheme will protect the lives and livelihoods of road accident victim. Risks relating to lifestyle

⁷ Road Accident Fund Commission (2002), p. 435

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protection will form part of discretionary protection in the Comprehensive Social Security System. This additional personal insurance costs due to increases in discretionary protection will be borne in mind with regard to the affordability of the no-fault system.

5.1.4 Sustainable

The change in system allows the State to set benefits according to affordability criteria and hence ensure sustainability. Integration in the Comprehensive Social Security System is critical to sustainability. In ensuring that critical service delivery platforms in emergency healthcare, rehabilitation and disability support are strengthened, the efficiency of the system will be enhanced, whilst a focus on road safety, injury prevention and treatment and incident management will improve the effectiveness of the system

5.2 Road Accident Fund Commission

The Road Accident Fund Commission proposed that the system of compensation be incorporated into the social security system as a no-fault benefit scheme outside of the law of delict. The fuel levy should be recognised as taxation and not as an insurance premium for a liability insurance scheme. A summary of the Commission's recommendations, the policy proposal derived from the recommendations and the key policy principles informing the proposal is provided in table 2 below.

The recommendations of the Road Accident Fund Commission were supported in full, except for four recommendations regarding 1) the mandate of the Benefit Scheme to be extended to areas for which other Departments are mandated; 2) retaining the common law liability for losses over and above the benefits made available; 3) the distinction between earners and non-earners for loss of income support as well as the extent to which these benefits are to be provided; and 4) the provision

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of life enhancement and family bereavement benefits to victims of road accidents.

5.2.1 Mandate of the Road Accident Benefit Scheme

The RABS should focus on providing benefits whilst the mandate for delivery on road safety, healthcare, rehabilitation, the creation of employment possibilities and opportunities for the disabled will remain with the various departments responsible. The scheme should support programmes that enhance the provision of healthcare and rehabilitation, incident management and employment opportunities for the disabled.

5.2.2 Abolish Common Law claim against another

The abrogation of common law rights is proposed to protect public interest. Those who want to protect their lifestyles can access personal insurance with no fear of personal liability arising from civil litigation. Personal insurance will therefore represent Pillar 3 of the comprehensive social security system, which allows for discretionary protection based on preference and willingness to pay. This will ensure that all road users are protected against civil claims against their person irrespective of their ability to afford liability insurance and legal representation.

5.2.3 Inclusion of non-earners for income support claims

The Inter-departmental Committee for Road Accident Victims took an alternative view as that recommended by the Road Accident Fund Commission, in which a differentiation between employed and unemployed were called for with income benefits only for employed and seriously injured unemployed. Those unable to prove income or who are unemployed will be able to claim at the minimum income or support threshold.

5.2.4 No provision of life-enhancement or family bereavement benefits

The Inter-departmental Committee for Road Accident Victims took an alternative view as that recommended by the Road Accident Fund

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Commission with regard to benefits for non-economic losses in the form of life-enhancement and family bereavement, as recommended. Although these provisions will increase the reasonableness of the system, it will create greater inequality between victims of misfortune and road accidents.

Table 2: RAFC Recommendations, policy proposals and principles

Details	RAFC recommendation	Policy Proposal regarding the Road Accident Benefit Scheme	Policy Principles
Rationale	Sufficient justification exists to provide benefits to victims of road accidents	Continued support by Government due to the extent of the risk, the impact of no government support and the cost of the problem.	Extension of the CSSS
Mandate	To provide timeous and appropriate benefits, including medical, income and life enhancement benefits. To manage information relating to road accidents, provide case management, quality management and service provision (rehabilitation, training, financial and employment support and legal advice)	The provision of timeous and appropriate medical benefits and limited benefits for income and support; and the collection and analysis of claims information on road safety, road accidents and injuries.	Progressive realization of right social security and healthcare
Benefit system	No-fault as a component of the social security system; divided over right to sue wrongdoer; report to the PPC on Welfare and Population Development	No-fault benefit scheme with no common law right to sue wrongdoer; the Road Accident Benefit Scheme will remain a national public entity under the Department of Transport within the CSSS as a form of contributory social insurance with a scheduled framework of benefits.	Cooperative governance framework to ensure coordination and alignment implementation and monitoring of social benefits.
Eligibility	All persons who suffer bodily injury on public roads in South Africa or who are family members of those who die on South African public roads should be entitled to seek assistance from the road accident benefits scheme for injuries sustained in road accidents, irrespective of the cause of the accident.	All persons who suffer bodily injury anywhere in South Africa or who are family members of those who die on South African roads should be entitled to seek assistance from the road accident benefits scheme for injuries sustained in road accidents, irrespective of the cause of the accident.	Restriction of cover to public roads leads to unreasonable exclusions.
Exclusions	Exclusion of claims from secondary victims; divided over exclusion on non-residents; social policy exclusion (intentionally self-inflicted death or injury; injury or death sustained while committing a crime and upon being convicted of that crime; injury or death sustained while driving a stolen or unlicensed vehicle.	No exclusion on emergency healthcare benefits; exclusion of claims from secondary victims; social policy exclusion (intentionally self-inflicted death or injury; injury or death sustained while committing a crime and upon being convicted of that crime; injury or death sustained while driving a stolen or unlicensed vehicle; injury or death sustained while driving without a valid licence)	Exclusion on non-South African citizens constitutionally unsound.
Emergency Medical Care	Injury or death sustained while driving without a valid licence) The provision of timeous, and effective emergency medical services and trauma care of a high standard should be identified and articulated as a priority in the provision of benefits to road accident victims.	The provision of timeous, and effective emergency medical services and trauma care of a high standard a priority in the provision of benefits to road accident victims.	Section 27(3) of the Constitution.

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Medical care	No ceiling limiting the duration or the extent of cost of the provision of healthcare is recommended. Tariffs to guide pricing of medical treatment are recommended.	No ceiling limiting the duration or the extent of cost of the provision of healthcare is recommended. Public Sector tariffs to guide pricing of medical treatment are recommended	Fuel levy income should not perpetuate inequalities between the public and private healthcare
Rehabilitation	<p>Rehabilitation benefits to all seriously injured victims including benefits for:</p> <ul style="list-style-type: none"> • Pharmaceuticals, prosthetics, corrective equipment and other aids and appliances required by injured or disabled road accident victims • Replacement of aids and equipment where necessary and reasonably required • Attendant care services • Vocational training, independent living and social rehabilitation programmes; • Reasonable cost of necessary modification to his or her home or residence; • Adaptation to own or family car or mobility allowance; • Institutional care. 	<p>Rehabilitation benefits to all seriously injured victims including benefits for;</p> <ul style="list-style-type: none"> • Pharmaceuticals, prosthetics, corrective equipment and other aids and appliances required by injured or disabled road accident victims • Replacement of aids and equipment where necessary and reasonably required • Attendant care services • Vocational training, independent living and social rehabilitation programmes; • Reasonable cost of necessary modification to his or her home or residence; • Adaptation to own or family car or mobility allowance; • Institutional care 	Accessible Transport Strategy to facilitate mobility
Income and support	<p>Divided over compensation for non-earners; propose a ceiling or limit relating to a percentage of pre-accident income or tax threshold or monetary maximum (R7000).</p> <p>Introduce waiting periods before accessing income support.</p>	<p>The proposed income and support benefits will be available as income related scaled benefits with both a minimum and a maximum threshold. Those unable to prove an income will be eligible for the minimum benefit. The proposal to introduce waiting period is rejected, with an understanding that this may lead to a motivation for abuse. The reason for the proposal is that providing support as and when needed would minimize the shock of an accident to victim's economic and social lives.</p>	Focus on the poor and providing access to all.
Life enhancement benefits	<p>Eligibility for life enhancement benefits of road accident victims who have sustained or experienced life-changing injuries</p> <p>Life enhancement benefits should be paid in a lump sum, the amount of which should be related directly to the degree of impairment.</p>	<p>The IDC took a stance that the State should not be responsible for providing support in relation to pain and suffering, loss of enjoyment of life or loss of amenities.</p>	Equity between victims of other misfortune

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Funeral benefits	Funeral benefits to be paid at a flat rate of R15 000	Funeral benefits to be paid at a flat rate of R5 000 (2004)	Equity between victims of other misfortune
Family adjustment benefits	Family adjustment benefits should be paid	The IDC took a stance that the State should not be responsible for providing support in relation to pain and suffering, loss of enjoyment of life or loss of amenities.	Equity between victims of other misfortune
Entitlement	<p>All primary victims of road accidents are entitled to emergency healthcare benefits, no exclusions.</p> <p>All victims of road accidents are entitled to healthcare benefits with no thresholds or deductibles before the provision of healthcare, save exclusions. Road accident victims electing to seek treatment at private facilities at rates in excess of benefits provided may receive treatment without forfeiting entitlement.</p> <p>All victims seriously injured in road accidents are entitled to rehabilitation benefits subject to initial and review assessment. The Road Accident Benefit Scheme shall bear all reasonable costs to access assessment.</p> <p>The Road Accident Benefit Scheme shall ensure that information on claims processes, assessment processes, rehabilitation, life care and support services are developed and disseminated to facilitate access to these benefits.</p>	<p>All primary victims of road accidents are entitled to emergency healthcare benefits, no exclusions.</p> <p>All victims of road accidents are entitled to healthcare benefits with no thresholds or deductibles before the provision of healthcare, save exclusions. Road accident victims electing to seek treatment at private facilities at rates in excess of benefits provided may receive treatment without forfeiting entitlement.</p> <p>All victims seriously injured in road accidents are entitled to rehabilitation benefits subject to initial and review assessment. The Road Accident Benefit Scheme shall bear all reasonable costs to access assessment.</p> <p>The Road Accident Benefit Scheme shall ensure that information on claims processes, assessment processes, rehabilitation, life care and support services are developed and disseminated to facilitate access to these benefits.</p>	The Social Cluster Task Team proposes a threshold on rehabilitation benefits to ensure sustainability.
Admin	<p>Healthcare, rehabilitation and life care tariffs;</p> <p>Direct supplier claims and a system of accreditation;</p> <p>Provision of benefits in instalments and lump sum payments for life enhancement benefits and family adjustment benefits;</p> <p>Initial and review assessments of injuries for rehabilitation and life enhancement benefits;</p> <p>Managed health care capacity;</p> <p>Proper governance and performance management;</p> <p>Capacity for data capturing and analysis, managed health care, and training of staff;</p> <p>Alternative conflict resolution mechanisms;</p> <p>Information and process management systems to monitor progress, trends and outcomes of the benefit scheme.</p>	<p>Healthcare, rehabilitation and life care tariffs;</p> <p>Direct supplier claims and a system of accreditation;</p> <p>Provision of benefits in instalments;</p> <p>Initial and review assessments of injuries for rehabilitation and life enhancement benefits;</p> <p>Managed health care capacity;</p> <p>Proper governance and performance management;</p> <p>Capacity for data capturing and analysis, managed health care, and training of staff;</p> <p>Alternative conflict resolution mechanisms: Social Security Adjudicator;</p> <p>Information and process management systems to monitor progress, trends and outcomes of the benefit scheme.</p>	Effectiveness of outputs and outcomes.

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Cooperative Governance	<p>Road Accident Benefit Scheme: Quality management: protocols of assessment, referrals and selection of providers Service provision: Rehabilitation, assessment of incapacity; training and accreditation of healthcare workers Claim support: Financial counseling and assistance in submission of claims, benefits for representation</p>	<p>Facilitate Emergency Healthcare capacity through National Incident Management System; Determination of assessment method; develop protocols to ensure effective healthcare and rehabilitation support; accreditation of healthcare workers; Facilitate injury and disability assessment capacity through Public Private Partnerships if feasible Monitoring and evaluation of healthcare services Road Safety: Facilitate through the provision of information interventions aimed at road safety; Verification of claims: Compatible information system for verification of claims aligned with the HANIS, NATIS, COIDA, SSS and UIF Cooperative Governance Framework for interdepartmental monitoring and evaluation.</p>	Focus on the RABS should not encroach on mandates of other Department, however the facilitation of programmes to support victims are proposed.
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5.3 *Mandate of the Road Accident Benefit Scheme*

The proposed mandate of the Road Accident Benefit Scheme is “the provision of timely, appropriate and limited medical, funeral, income and support benefits to victims of road accidents, and the collection and analysis of relevant information.”

5.4 *Policy principles underlying the Road Accident Benefit Scheme*

The key policy principles that underlie the creation of the Road Accident Benefit Scheme is:

- 5.4.1 To diminish the impact on persons who suffer loss or damage as a result of bodily injury or death caused by a motor vehicle accident;
- 5.4.2 To provide victims with support so that such victims are, if possible, reintegrated into social life and economic activity;
- 5.4.3 To provide equal and appropriate support that is accessible to all.

5.5 *Benefit framework*

Benefits will be provided on a no-fault basis, i.e. irrespective of the negligence of the driver. This aligns the benefits to the principle of social security. Apart from providing for a more equitable, reasonable and sustainable system, the shift to no-fault also removes the inefficiencies of the law of delict as a basis for compensation. To ensure that the system of benefits satisfies the need for justice with regards to road traffic offenders, repeat offenders will be excluded from all benefits, save emergency healthcare benefits. By excluding repeat offenders, socially reprehensible behavior on the roads is discouraged without threatening a driver’s financial position due to a moment of inattentiveness. In this regard, a stronger focus will be placed on enforcement, whilst offences of a criminal nature will be dealt with through the Criminal Justice System.

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Table 3 provides an overview of the proposed benefits.

Table 3: Overview of proposed benefits

Benefits category	Slight Injury	Moderate Injury	Serious Injury	Fatal Injury
HEALTHCARE BENEFITS (TARIFF)				
Emergency Medical Services	x	x	x	x
Healthcare: Public Healthcare Tariffs	x	x	x	
Rehabilitation			x	
Funeral				Flat rate
INCOME/ SUPPORT BENEFITS				
Income / dependant support		Scaled income and support benefits with a minimum income and a maximum threshold		
NON-FINANCIAL LOSSES				

5.6 Eligibility

All persons who suffer bodily injury anywhere in South Africa or who are a dependant of those who die in road accidents in South African will be entitled to seek assistance from the Road Accident Benefits Scheme for income and support benefits, emergency healthcare, healthcare and rehabilitation benefits and funeral benefits.

- 5.6.1 Income benefits: Income benefits will be made available on a monthly basis for those victims who are unable to work due to the injury sustained. The benefits available in accordance to scaled income and support benefits with a minimum and a maximum pro rata rate for days unable to work. These benefits will be paid to the victim directly.
- 5.6.2 Support benefits: Support benefits to those who were dependant on victims of fatal accidents will be made available on a monthly basis to the spouse for the duration of his or her life or for children up to the age of 18. The benefits will be within a scale of minimum and maximum benefits

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depending on the income of the deceased and the spouse. Support benefits will be focused on surviving spouses or partners and children. The definition of spouse includes marriage as defined by law, religious unions and same-sex unions. Children include natural children of the deceased as well as adopted children (customary and family law) and a child to whom the deceased stood in *loco parentis*. Support grants for children under 18 who have lost both parents will be paid to a curator. Those unable to claim for support should not be excluded from claiming for child support grants, old age grants or disability grants.

5.6.2.1 Healthcare benefits: Healthcare benefits will be available for all services needed. These will be paid according to public healthcare tariffs as published in the National Health Act, 2003.

5.6.2.2 Rehabilitation benefits will be paid for all victims who sustained serious injuries. Access to rehabilitation benefits will be dependant on injury assessments to determine the needs of the disabled victim. The RABS must be supported through comprehensive injury risk management to ensure optimal patient care, resulting in low levels of residual disability, at minimum costs incurred through efficient healthcare services and accepting long-term liability for the ongoing care of needed cases. A limit on the rehabilitation benefits available has been proposed.

5.6.2.2.1 These benefits will include:

- Pharmaceuticals, prosthetics, corrective equipment and other aids and appliances required by injured or disabled road accident victims
- Replacement of aids and equipment where necessary and reasonably required
- Attendant care services
- Vocational training, independent living and social rehabilitation programmes;
- Reasonable cost of necessary modification to his or her home or residence;

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- Adaptation to own or family car or mobility allowance;
- Institutional care.

To prevent over-servicing it is proposed that the benefits available for these services are limited to a reasonable and affordable amount; tariffs for these products are not available in South Africa.

- 5.6.3 Funeral benefits: Funeral benefits will be available to the parents, surviving spouses or partners or children. Funeral benefits will be R5 000 (2004) per deceased victim.

5.7 Exclusions

5.7.1 To discourage socially reprehensible behavior and ensure a sense of justice for drivers and passengers contributing to the Fund, it is recommended that drivers who do not have valid licenses or whose vehicles are not registered and any accident resulting from criminal activities be excluded from compensation for medical and income support benefits⁸.

5.7.2 Exclusions from access to healthcare, rehabilitation, income and support benefits for drivers who are not in possession of valid drivers license, or drivers driving an unlicensed vehicle (passengers not excluded), or drivers and passengers where accident happened in the committing of a crime⁹. However, different opinions have been raised by the Board and the Department of Social Development, that these exclusion be removed and that the benefit scheme should not play a punitive role.

⁸ The points demerits system proposed in the Administrative Adjudication of Road Traffic Offences Act, 1998 will play a vital role in ensuring that those drivers who repeatedly put themselves and other road users at risk are excluded from all benefits save emergency treatment.

⁹ Suspended licenses as proposed in the Administrative Adjudication of Road Traffic Offences Act, 1998, will also be excluded.

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- 5.7.3 Exclusions from rehabilitation benefits for those not seriously injured, based on assessment aligned to those used for disability and free healthcare assessment.
- 5.7.4 Exclusions from access to healthcare, rehabilitation, income and support benefits for secondary victims who witnessed or heard of an accident.¹⁰
- 5.7.5 The Inter-departmental Committee proposed that no claim for non-pecuniary loss or pain and suffering would arise from a road accident. This is to align the benefits received to other forms of social protection.

6. IMPLEMENTATION PLAN

6.1 Governance

The Road Accident Benefit Scheme will remain an independent institution under the Department of Transport, within the Comprehensive Social Security System as a form of contributory social insurance with a scheduled framework of benefits.

It is imperative that monitoring be done inter-departmentally and be focussed on outcomes of the scheme. Relevant areas include accessible public transport, improved emergency healthcare treatment and incident response management, improvements in the public healthcare and rehabilitation system and accessible workplaces and training for the disabled. The impact of the policy change in terms of equitable and reasonable outcomes, affordability, efficiency and effectiveness should be measured from the inception of the policy.

¹⁰ These secondary victims will have to be allowed to claim against the wrongdoing driver.

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6.2. *Dispute resolution*

To limit costs and delays in the delivery of benefits, alternative dispute resolution mechanisms should be incorporated into the system of the new scheme without hindering access to the courts.

6.3 Funding: Transitional and Institutional

6.3.1 Funding the Road Accident Benefit Scheme

The current collection of revenue through the fuel levy is regarded as effective and efficient, it is in line with levies charged for high-level coverage by no-fault schemes such as New Zealand, Victoria and Tasmania and fault-based schemes such as Southern Australia, which collect premiums through vehicle licenses. However, the funding of the scheme through the fuel levy removes the relationship between the driver and their risk profile and the contribution made to the fuel levy. The fuel levy will remain the primary source of funding for the new scheme. It is proposed that a formal process of annual adjustments to the fuel levy is put in place. In addition, and for sustainability and self-sufficiency of the organisation, other sources of funding will have to be considered.

Funding for the Road Accident Benefit Scheme should be ring-fenced to allow for proper financial control of the three different systems of compensation / benefits that will be in operation.

6.3.2 Funding the Institutional Transition

The transitional funding of the introduction of a new system includes funding for the accumulated outstanding claims liability, which has built up in the current system of compensation of the last twenty years. It is proposed that the transitional funding for the creation of the Road Accident Benefit Scheme is funded through the fiscus. The recent payments to

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alleviate the short-term liabilities of the Fund included funding of R200 000 to initiate necessary improvements on the Information Technology System, which will be able to accommodate the change to a no-fault system.

6.4.2 Managing the Institutional Transition

The Road Accident Fund will manage the transition to a new institution with support and oversight from the Department of Transport.

7. CONSTITUTION AND COMMON LAW RIGHTS

7.1 Abolishment of the common law

"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both."
JM Burchell 1982

The abrogation of common law rights is proposed to protect public interest. Those who want to protect their lifestyles can access personal insurance with no fear of personal liability arising from civil litigation. Personal insurance will therefore represent Pillar 3 of the comprehensive social security system in which discretionary protection based on preference and willingness to pay. This will ensure that all road users are protected against civil claims against their person irrespective of their ability to afford liability insurance and legal representation.

As opposed to developed countries where a high percentage of the population is in a position to protect themselves through liability insurance, indications from vehicle insurance is that approximately 30% of the road using population have sufficient insurance to cover liability claims. The impact of our specific socio-economic situation is that if the common law right to sue the wrongdoer is retained, those who will be sufficiently covered by the available benefits will face the threat of claims against their

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person, whilst those who are in a position to afford liability insurance will have to protect themselves through personal insurance in case the wrongdoer is unable to honor claims against his/her person.

The access to common law remedies therefore necessitates liability insurance and personal insurance for those able to afford it, whilst placing the middle class in a position in which their assets will be at risk as they may not be able to afford the insurance. Such a system will advantage those with resources for protect their lifestyles, whilst exposing all road users, who cannot afford both liability and personal insurance, to the risks of civil litigation.

7.2 *Threat to constitutionality of proposed policy*

It is important to note that South Africa will be the only country to exclude general damage claims whilst not allowing common law claims against another. Other no-fault systems provide either general damages for seriously injured victims or provide access to the common for those who sustained serious injuries. The policy motivation for excluding general damage claims is to providing equitable compensation to all victims of misfortune. The constitutional question is whether the system of limited benefits that will replace the common law right to claim, would provide appropriate relief to those injured in road accidents.

7.3 *Constitutional obligation of the Minister of Transport*

The Constitution protects our right to be free from all forms of violence. With regards to road accidents, this means road safety management and enforcement, protecting careful drivers against those refusing to accept the rules of the road. Furthermore, there is an obligation to provide for the progressive realization of the right to social security and healthcare without any unfair discrimination.

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8. IMPACT ON VARIOUS SOCIAL GROUPS

8.1 Road users

In return for contributions towards the fuel levy, road users will be eligible for benefits and will be protected against personal injury claims against their person. However, those wanting to insure themselves against higher risks than those covered by the Scheme will need to take out personal insurance for those damages not covered by the future scheme. Indications from the insurance industry and the international experience of New South Wales, Ontario and British Columbia mentioned above indicate that such insurance may not be as out of reach as many fear. The impact of personal insurance cover will impact on the cost of travel to South Africa for those wanting cover for additional risks not covered by the Road Accident Benefit Scheme.

8.2 Woman

The more inclusive system will lighten the burden on women, as the role of primary care givers is largely associated with women.

8.3 Children

The allowance for benefits to all victims of road accidents will allow for children as passengers to be eligible for benefits, irrespective of the cause of the accident. A greater focus on rehabilitation will benefit children as their injuries have a greater impact on their future opportunities.

8.4 Disabled

A no-fault system will increase the focus on those seriously impaired due to an accident. Direct compensation for medical services in the 'golden hour' will reduce the level of impairment caused by road accidents, whilst a focus on rehabilitation will ensure disability is minimized in relation the impairment sustained.

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8.5 Legal fraternity

Changes to the benefit system will adversely affect certain members of the legal profession. As trained professionals, they have the skills, knowledge and background to be able to expand their practices to deliver services in other fields of the law as well.

8.6 Healthcare providers

A no-fault system is welcomed from a healthcare perspective as it allows for better access for all to timely and quality care. The system will remove current discriminatory outcomes and remove obstacles to access the necessary care as soon as possible.

However, the impact of the introduction of a no-fault system in terms of providing appropriate medical care will remain limited in the current context of an unequal access to healthcare. The introduction of a more equitable and comprehensive healthcare system will ensure improvements of the delivery of healthcare to the majority of road accident victims allowing for equitable benefits and equitable outcomes. In this regard the proposal for a National Health Insurance system is supported.

9. PUBLIC CONSULTATION

This strategy represents the culmination of consultation initiated by the Road Accident Fund Commission. The Commission embarked on extensive consultation both nationally and internationally.

The Interdepartmental Committee for Road Accident Victims was established in May 2004. The following Departments were represented on the Inter-departmental Committee for Road Accident Victims (IDC): Department of Transport, Health, Social Development, Labour, National Treasury and Government Communication and Information System. Observers to the process included Road Accident Fund management, South African Commuter Organisation and organized labour. Experts in

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social security, healthcare service provision and policy, law and financial modeling supported the IDC, whilst international best practice was provided by a project manager appointed and regional and international experts invited to a workshop hosted by the IDC. The policy process followed by the IDC was communicated in stakeholder meetings arranged for victims, the legal and medical fraternity in Durban, Cape Town and Pretoria. All the comments made were captured and a database developed to facilitate further public participation.

The Board of the Road Accident Fund has been consulted on the draft strategy and their views have been incorporated. In the Board's analysis and conclusion they state:

"The RAF welcomes the proposal to depart from the current fault-based unlimited liability compensation system that is fraught with inequities and has proven to be unsustainable. The RAF supports the integration of RABS into a comprehensive social security system as this accords both with the rights of individuals entrenched in the Constitution and also with the commitment of Government to develop a Compulsory Social Security System that will provide uniform integrated social benefits".

During the recent benchmarking trip undertaken by the Social Cluster the policy positions with regard to framework of benefits were revisited and adjusted.

10. CONCLUSION

The tension between providing for those unable to look after themselves due to injuries sustained in a road accident and the idiosyncratic forces created by the fault-based system have been in existence for 50 years.

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Those who have suffered due to this tension have been those initially seen as the key beneficiaries of road accident compensation. Within the highly contested space, it is critical to clearly indicate the policy objectives of Governance with regards to providing compensation for road accident victims.

The proposed policy set out above opens a new path based on social security objectives, whilst personal and discretionary insurance will replace current lifestyle protection.

The unintended consequences of such a change, specifically the abrogation of the common law right to sue the wrongdoer, will necessitate constant monitoring of both the common law implications, legal and political implications for Government as well as possible policy choices with regards to providing social security in a context of high unemployment, high accident rates and poverty.